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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

MOHAMMAD QAMMAR AZEEM,

Defendant and Appellant.

C067637

(Super. Ct. No.
CRF100001010)

Following a jury trial, defendant Mohammad Qammar Azeem was found guilty of sale of methamphetamine, transportation for sale of methamphetamine, possession of methamphetamine for sale, and possession of marijuana for sale, along with an enhancement for a prior narcotics conviction. The trial court sentenced defendant to seven years eight months in state prison.

On appeal, defendant contends the trial court committed prejudicial error when it declined his request to instruct the jury on the date of the possession of methamphetamine charge. We affirm.

FACTS

Yolo County Deputy Sheriff Gary Hallenbeck was on assignment with the YONET regional task force in January 2010. On January 14, 2010, he called a man called "Mo" and arranged to purchase methamphetamine from him for \$650 on January 19.

On January 19, 2010, Deputy Hallenbeck and Mo agreed to a \$600 price and to meet at the parking lot of a Sacramento Target store. When Deputy Hallenbeck arrived at the parking lot, he was met by defendant. Defendant got into Deputy Hallenbeck's car and sold him a baggie of methamphetamine for \$600. The parties stipulated that the methamphetamine weighed 13.59 grams, a useable amount.

On February 3, 2010, a search warrant was executed at a West Sacramento tire business. Defendant, who was at the business, was searched. An officer found two bindles of methamphetamine in defendant's right front pocket, and \$2,027 in cash and a pay/owe ledger in his left front pocket. A digital scale, a piece of plastic bag with several portions torn off, and five packages of marijuana were found at the business.

Defendant agreed to speak with officers after he was arrested and advised of his constitutional rights. He initially denied involvement in drug trafficking, but when confronted by Deputy Hallenbeck, defendant exclaimed: "I sold dope to an undercover cop. I got no defense." Defendant then admitted selling methamphetamine, but not often, and mainly to friends.

The parties stipulated that the bindles of methamphetamine found on defendant contained .19 and .20 grams of

methamphetamine, each a useable amount, and the packages contained 1.07, 4.51, 21, 23, and 26 grams of marijuana, all useable amounts.

Defendant was convicted on charges stemming from the two incidents. The charges in counts 1 and 2, sale of methamphetamine and transportation of methamphetamine, were based on the January 19, 2010, undercover purchase of the drug from defendant. The charges in counts 3 and 5, possession for sale of methamphetamine and possession for sale of marijuana, were based on the February 3, 2010, search.

DISCUSSION

Defendant contends the trial court prejudicially erred by giving inadequate instructions to the jury after it returned guilty verdict forms for the greater and lesser included offenses on count 3. We disagree.

The jury returned a verdict form showing defendant guilty in count 3 of both the charged offense of possession of methamphetamine for sale, and another verdict form finding him guilty of the lesser included offense of simple possession of methamphetamine. Seeing the two guilty verdict forms, the trial court stated the jury did not understand CALCRIM No. 3517 (completing verdict forms for lesser and greater offenses) and proposed to give the following instruction:

"You've signed verdict forms indicating that you've found the defendant guilty of possession for sale of a controlled substance as charged in Count 3 and of the lesser offense of simple possession of a controlled substance. [¶] You should

re-read Instruction 3517, see pages 27 and 28, which indicates that if you have found the defendant guilty of the greater charged offense, then you only complete the verdict form for that crime. You do not complete any other verdict form as to that Count. [¶] On the other hand, if you have all agreed that the defendant is not guilty of the greater charged crime but you have all agreed that he is guilty of the lesser crime, then you should sign the not guilty verdict form for the charged offense and the guilty verdict form for the lesser offense. [¶] I am providing you with unsigned verdict forms for the greater charged crime and the lesser included crimes so that you may resolve this problem."

Defense counsel suggested the jury's confusion might be caused by the verdict forms' failure to state the date of the charged offenses. Counsel argued that the jury might have assumed that if defendant possessed the methamphetamine on January 19 then he also possessed it for sale, while concluding that defendant possessed the methamphetamine for personal use on February 3. Counsel asked the trial court to instruct the jurors on the dates of the charged offenses in order to "clear up any misconception that the jury might have."

The trial court recognized that the jury followed CALCRIM No. 3517 regarding count 5, the possession for sale of marijuana charge. Noting that the charges and both sides' arguments referred to the dates of the offenses, the trial court denied defendant's request. The trial court gave the proposed

instruction without modification, and provided the jury with new verdict forms for count 3.

After further deliberation, the jury returned the forms. The verdict form for possession of methamphetamine for sale was marked guilty and the form for simple possession of methamphetamine was returned unmarked.

According to defendant, the "simplest way of explaining the jury's behavior, returning only one verdict on count 5 but two on count 3 was that the jury believed that the marijuana (count 5) was not for personal use, whereas the methamphetamine (count 3) was for personal use." He further claims that this result would be consistent with the evidence. Defendant asserts the trial court should have instructed the jury that the charge in count 3 related to the events of February 3 in order to dispel the "jury's evident confusion," and concludes the trial court's failure to so instruct violated his due process right to a fair trial.

In reviewing the claim of instructional error, "we inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." [Citations.] (*People v. Frye* (1998) 18 Cal.4th 894, 957, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) In conducting this inquiry, we must view the challenged instruction in the context of the overall charge, rather than judged in artificial isolation. (*Ibid.*; see also *People v. Smithey* (1999) 20 Cal.4th 936, 963.)

The trial contained numerous references to the dates of the respective offenses. The information, which was read to the jury at the beginning of the trial, stated that defendant was alleged to have committed the offenses in counts 1 and 2 on January 19, 2010, and the offenses in counts 3 and 5 on February 3, 2010. In addition, the prosecution and the defense both framed their respective arguments on the dates of the charged offenses.

In his closing argument, the prosecutor recounted the January 19 undercover drug buy, and concluded: "Based on the events of January 19th, the only reasonable conclusion is the defendant is guilty of Count 1 and Count 2." The prosecutor then addressed the events of February 3. First, the prosecutor noted that defendant's statement after his arrest on that day corroborates Deputy Hallenbeck's testimony regarding the January 19 drug buy, and thus tended to prove the charges in counts 1 and 2. The prosecutor then continued: "But then let's get into the items that were found on February 3rd because that deals with Count 3, the possession for sale of methamphetamine and Count 5, the possession for sale of marijuana."

The prosecutor concluded the closing argument with the following statements: "Ladies and gentlemen, when you go through these facts chronologically, there's only one conclusion that they support that on January 19th, 2010, Mohammad Azeem transported and sold methamphetamine. [¶] On February 3rd, 2010, Mohammad Azeem possessed methamphetamine and possessed marijuana both with the intent to sell[.]"

Defense counsel, after arguing that defendant did not possess the methamphetamine baggies for sale because he told the officer he used the drug, stated: "Then that comes down to Counts 2 and 1 which occurred on January 19th[.]" The prosecutor also referred to the dates of the charges on rebuttal, with statements like "we get to the issue of the possession for sale of the drugs on February 3rd," "Is it reasonable to believe that on January 19th, 2010, Mohammad Azeem transported and sold methamphetamine to Agent Hallenbeck," and "Is it reasonable based on the evidence to believe that on February 3rd, 2010, Mohammad Azeem possessed methamphetamine and marijuana with the intent to sell?"

The charges and counsels' arguments made clear that the possession of methamphetamine for sale charge referred only to the events of February 3, 2010. Defendant's explanation for the duplicate verdict forms for count 3 is neither the simplest, nor supported by the record. The simplest and by far the most likely explanation for the duplicate verdicts is that the jury accidentally returned guilty verdict forms for both the charged and lesser offenses in count 3. The fact that the jury did not return a verdict form for the lesser included offense of simple possession of marijuana in count 5 does not support defendant's speculative contention that the jury in fact thought defendant was guilty of only simple possession of methamphetamine in count 3.

Defendant's argument that the evidence shows he was guilty of only the lesser included offense in count 3 is likewise

without merit. The evidence of defendant's guilt on possession of methamphetamine for sale in count 3 was overwhelming.

Defendant was caught with two small bindles of methamphetamine on February 3, but he also had a large amount of cash, pay/owe sheets, and a digital scale -- all indicia of possession for sale according to the prosecution's expert witness. More importantly, defendant previously sold methamphetamine to an undercover officer, and later admitted to selling the drug.

It is not reasonably probable that the jury was confused by the verdict forms' failure to refer to the respective dates of the charged offenses. The trial court did not err in rejecting defendant's requested modification to the instruction.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

HULL, Acting P. J.

HOCH, J.